No. 2963.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,
Plaintiff and Appellant,

vs.

E. A. FARRINGTON and L. A. HOUCK, co-partners, doing business under the name and style of PACIFIC TRANSFER COMPANY, J. DANIELS, H. SANDGATHE, doing business as SPRINGFIELD GARAGE, V. W. WINCHELL and F. M. HATHAWAY, co-partners, doing business under the name and style of EUGENE FORD AUTO COMPANY, and A. WILHELM and JOHN DOE WILHELM, co-partners, doing business under the firm name and style of A. WILHELM & SON,
Defendants and Appellees.

PETITION FOR REHEARING

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

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PETITION FOR REHEARING

The plaintiff and appellant, at this time, petitions the court for a rehearing and a reconsideration of the above entitled cause, and respectfully submits that the opinion written by the court discloses that the court has overlooked some of the issues upon which the case was submitted to the court, and some of the evidence introduced, and has taken

for granted some things which the evidence does not support.

The appellant urges a reconsideration of the cause upon the merits, and will also contend at this time that the trial court had no jurisdiction to try the cause.

THE MERITS OF THE CASE.

The printed record in this case contains 320 pages, and appellant submitted a brief of over 150 pages. Perhaps on account of this voluminous record, we respectfully submit that the court has lost sight of some of the material issues upon which the case was tried and some of the facts established on the trial.

This court seems to us to have followed the trial court wherein it assumed, and instructed the jury, that the defendants were entitled to recover, because of plaintiff's failure to make any demand for the return of the cars replevined, or to make a tender of the advances made by the defendants to the plaintiff pursuant to the contract under which the cars had been consigned by the plaintiff to the defendants. Both courts have held that under the contract of consignment, plaintiff retained title to the consigned cars until they were sold to users, and that

the plaintiff was entitled to, and did, cancel the contract in accordance with the provisions thereof. As this court, in its opinion has said:

> "In case of a cancellation of the contract, the plaintiff had the right to retake the unsold cars, at the same time repaying to the consignees the full amount of their advancements. When the notice of cancellation was given, the defendants had on hand 37 of the cars so consigned, on account of which they had advanced the aggregate sum of $16,077.50, including freight charges. A day or two following the notice, one of the plaintiff's representatives visited the defendants at their place of business, and after discussing with them matters relating to the closing up of the contract and turning over the cars, he went to Portland to advise with his superior."

We pass at this time the obvious inference from this statement that there must have been at that interview a request for the return of the cars, with the remark that we do not understand that a demand has to be couched in any precise form of words.

Thereupon, the opinion of the court, after alluding to the apparent regrettable lack of courtesy on the part of plaintiff's representative shown toward the counsel for the defendants, states that—

> "A few days later, on June 3rd, the suit was commenced without first making any formal demand for the cars, or tendering the $16,077.50, which the defendants were entitled to receive."

In making this statement, which is apparently the premise upon which the court's opinion is based, we respectfully urge that the court, perhaps by reason of the excessive length of the record, has fallen into a misapprehension of the issues tendered and the facts developed upon the trial. Had the defendants merely stood upon the lien secured to them by the 13th paragraph of the contract, their possession of the property, thus asserted, would have been a rightful possession, subject to termination by the plaintiff only by compliance with the provisions of the contract.

But the defendants were not satisfied to admit the ownership of the plaintiff in the property, claiming a lien thereon, or that, as the court has said—"under the contract the plaintiff retained title to the consigned cars until they were sold to users." By their answer, they denied that plaintiff had retained the title to the property until sold, or that it was entitled under any conditions or circumstances to a return of the property, and the defendants asserted an ownership in themselves, absolute and exclusive, inconsistent with any claim of lien. And the defendants re-asserted and reiterated in varying forms in

four further and separate answers and defenses, this claim and defense of ownership. And this claim that the property replevined had been sold by the plaintiff to defendants and was their absolute property is repeated in the evidence and finally in the defendants' brief in this court. The defendants plainly and clearly went to trial upon a claim of absolute ownership in themselves, and repudiation of any right on the part of the plaintiff in the cars, or any right of possession thereto. The theory of the law in insisting upon a demand where a possession is rightful and ownership admittedly in the party making demand, is that, upon proper demand, defendant will surrender possession, and that he ought not to be held for failing to surrender possession unless asked so to do. But defendants in this case have made it abundantly clear by their position upon the trial that they would not have yielded possession under any circumstances, and that the omission of demand, if there was an omission, which we do not concede, in no way changed their attitude.

The purpose and effect of a demand for possession is to convert a rightful holding and possession by a defendant into a wrongful detention, by a refusal to comply with the demand. Where a defendant's possession is wrongful, or based upon an absolute denial of any right in the plaintiff under any circumstances to retake possession, the law does not require so futile a thing as a demand, and likewise

it is an unnecessary and futile thing to prove a demand when the defense is based on a denial of plaintiff's right to possession under any circumstances. The defense asserted converted a rightful possession into a **wrongful detention.** We refer again to that decision of the Supreme Court of the State of Oregon, where this case arose, wherein it is said:

> "Moreover the defendant in his answer claims the title to the property, and where such is the condition of the pleadings, no proof of demand is necessary."

Brown v. Truax, 58 Ore. 572, 577.

This matter was discussed in our original brief, beginning at page 59.

But we do not need to rely upon the fact that the defendants, by choosing as their ground of defense the claim of absolute ownership in themselves with its consequent repudiation of any claim or interest on the part of the plaintiff, rendered unnecessary proof of demand, and we respectfully urge that the premises on which the court's opinion seems to be based, following the action of the trial court in taking from the jury consideration of the questions of demand and tender, rest upon a failure to consider all the evidence introduced in the case.

The testimony clearly indicates both a demand and a tender.

One of the defendants testified (Abstract, page 257):

"A. Well, he said that could be taken care of afterwards. He says, 'I can't say, you may just have to scrap that out with the Ford Motor Company, but I am prepared to pay the 85 per cent.

Q. Well, what else was said?

A. Well, we told him that we couldn't consider a proposition of that kind.'

"Note the language of the defendant where it said—**'Well, we told him that we couldn't consider a proposition of that kind.'** Here in this quotation and in the testimony from which it is taken is a positive refusal to accept the 85 per cent unless other sums were paid at the same time.

Again on pages 268 and 269, Transcript of Record, we find further evidence by one of the defendants himself of a tender and a positive refusal.

Q. And what did he say they would do?

A. They would pay us the 85 per cent of the selling price or list price of the Ford cars—these cars that were in question.

COURT: That is, they would return to you

the money you had paid on the cars—was that it?

A. Yes, sir.

Q. **And you refused to accept that?**

A. **Yes, sir."**

IS IT POSSIBLE TO READ THIS TESTIMONY OF A DEFENDANT, AND BELIEVE THAT HE DID NOT UNDERSTAND THAT PLAINTIFF'S REPRESENTATIVE WAS OFFERING HIM $16,077.50, AND THAT HIS REFUSAL TO ACCEPT WAS BECAUSE, AND ONLY BECAUSE, HE WAS DEMANDING OTHER SUMS OF MONEY OR OTHER CONDITIONS TO WHICH, UNDER THE CONTRACT, HE WAS NOT ENTITLED?

AND, FURTHER, AS A REASONABLE PROPOSITION, IS IT POSSIBLE TO BELIEVE THAT THE PLAINTIFF'S REPRESENTATIVE WAS OFFERING TO PAY TO THE DEFENDANT $16,077.50 WITHOUT ASKING RETURN OF THE CARS?

A demand and tender do not consist of some prescribed form of words, but they consist rather of the legal effect of what has been done. Here in the testimond quoted, the defendant stated in reply to a question by the trial judge, that they refused to accept the money they had paid on the cars, namely,

the $16,077.50. Why should he say they refused it if he didn't understand that it had been tendered?

At the bottom of page 88 of the Transcript of the Record, which is a part of the bill of exceptions, appears an exception by the plaintiff to the action of the court in giving the instruction approved by this court. This court says:

> "There is no pretence that tender was in fact made."

We respectfully urge that defendants' own testimony shows that tender was in fact made, and we submit that the trial court was wrong in taking this question from the jury, and we respectfully urge that this court must have overlooked the testimony quoted above.

And as cumulative argument, we allude again to the fact that the defendants' answer does not rest their defense upon the claim that they were entitled under the contract to retain possession of the cars until repaid the sum of $16,077.50, with the necessary corollary that upon the payment of that sum, the plaintiff was entitled to recover possession, but rather, they stood upon an absolute denial of any right under any circumstances in the plaintiff, and the claim of complete ownership in themselves.

In our brief, beginning at page 37, we endeavor

to point out certain errors of the trial court in its instructions relative to the question of damages, and to this phase of the case the Appellate Court has not alluded in detail.

May we respectfully ask the court to re-read and reconsider that portion of our brief found from pages 37 to 49? And we beg to remind the court that the contract between the plaintiff and defendants was lawfully and rightfully terminated some time prior to the institution of the replevin case. After this termination, the rights of the parties stood arrested and fixed as provided in the contract.

By the contract, the defendants had a lien on the property for the amount of their advances, and those advances were the subject of discussion between the defendants and plaintiff's representative, but from the time the contract was terminated the defendant had no right to sell the consigned cars unless requested to do so by the plaintiff, as it is provided in the 49th paragraph of the contract it may do, it being there provided that:

> "Or at the option of the first party, it shall be the duty of the second party, and he undertakes (for the purpose of winding up the affairs of his said limited agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration."

There is no claim, or pretence, or evidence, in this case that the plaintiff ever exercised the option thus provided, and required the defendants to continue selling. On the contrary, it is beyond controversy that the plaintiff did not desire defendants to sell any more cars, and did desire to take the unsold cars back. In this condition of the contract and the relations between the parties, it was certainly error for the trial court to instruct the jury as it did (Transcript, page 106) that—

> "The taking of the cars away from the defendants, of course, deprived them of the right to sell them, and of any profits that they might have derived from the sales. That was one thing that, of course, was the result of this taking of the cars by the plaintiff company. Now, the profits on the sales would, of course, be a matter to be considered by the jury in arriving at your verdict in this case."

It was not the beginning of the replevin that deprived the defendants of the right to sell the cars, but the termination of the contract, and the court correctly held that that termination was within plaintiff's rights. These instructions permitted the jury to take into consideration profits which the defendants might have earned if there had been no cancellation an dthey had sold the cars, and that such profit had remained after the expense of con-

ducting business, but profits to which the defendants were in no way entitled after a cancellation.

These profits unquestionably were included in the $6000 damages allowed by the jury, and figured up to the sum of $2,477.75.

The jury were also allowed to include in their verdict, under the instructions of the court, profits which the defendants believed they would have made from the operation of the garage conducted by them in connection with their business, but the court is reminded that the evidence shows that the garage business was sold to Vick Brothers prior to the commencement of the replevin case, and subsequent to the cancellation of the contract. This sale to Vick Brothers was not a result of the replevin, but a result of the cancellation, which cancellation was admittedly within the plaintiff's rights. Defendants did not wait for a replevin suit to sell out their business to Vick Brothers, but evidently decided that if they could not represent the Ford Motor Company they had better go out of business. But if these profits in the garage business were allowed at the maximum amount testified to from the date of the replevin suit to the date of trial, the damages from this source could not exceed $1030. The testimony quoted on pages 42, 43 and 44 of our brief is the testimony of one of the defendants, and shows the relationship between the cancellation of the contract and

the sale to Vick Brothers, and demonstrates that this item of damages ought not to have been allowed.

Hathaway, one of the defendants, testified (Transcript, page 266) that the Ford Motor Company, by its replevin suit, stopped the defendants from carrying out their deal with Vick Brothers. If this were true, it would constitute the only damages which the defendants could trace to any act of the plaintiff, and they sold out to Vick Brothers for less than $2000.00, of which they had already received $1000.00 in cash before the replevin suit was started.

In our original brief (page 41), we challenged counsel for defendant to show by the record any other item of damage supported by any evidence in this case, and we respectfully submit that these two items of damage were erroneously submitted to the jury by the trial court.

The testimony of both defendants appears in full in the Transcript of Record (pages 217 to 252), and there is no statement by either of them, or any one on their behalf, that they were damaged in the sum of $25,000.00, as alleged in the pleadings, nor in the sum of $6,000.00 as found by the jury, nor are there any damages testified to, except that relating to the profits which the defendants think they would have made if the contract had not been terminated, and the estimated profits of operating their garage. Not-

withstanding the claim in the pleadings, there was no attempt on the trial of the case to prove any other damages, and the jury went beyond the evidence in giving damages, and the court erroneously interpreted the contract in allowing the profits as an element of damages.

The bill of exceptions appears in the Transcript beginning on page 44. Attached to the bill of exceptions is a copy of the Transcript of the Testimony, beginning at page 131 of the Transcript. Beginning at page 87 appear the instructions of the court excepted to, with evidence to explain the exceptions. On page 87 appears, as a part of the bill of exceptions, what amounts to a certificate by the trial court to the effect that on the trial, counsel for the defendants contended that title to the automobiles in question passed to the defendants on the payment of the 85 per cent of the purchase price therefor, provided for in said contract. This statement by the court of the defendants' position is in line with their pleadings herein before alluded to, wherein they absolutely deny any right or title, or right of possession in the plaintiff, and assert absolute ownership and right of possession in themselves.

In spite of this condition of the Record, the trial court, as we believe, erroneously and in disregard of evidence that at the very least should have been submitted to the jury as tending to show, and as we be-

lieve showing, both a tender of the $16,077.50 and a demand for the return of the cars, instructed the jury in effect that the plaintiff had no case to submit to them, and that the only question before them was the amount of defendants' damages, and then as we contend, erroneously, instructed the jury permitting them to include in their verdict items of anticipated profits to which the defendants could never have become entitled even though the replevin case had never been brought.

THE QUESTION OF JURISDICTION.

In taking up the question of jurisdiction, the writer of this petition for rehearing feels entitled to offer a word of explanation. As was suggested to the Appellate Court upon the oral argument by counsel on the other side, neither the writer hereof nor his firm participated in the proceedings in the court below, and were only called into this case after an appeal had been perfected for the purpose of writing the brief and arguing the case here.

It is with some diffidence that we admit that we have fallen into the same error as the District Court and the Circuit Court of Appeals, and taken the record for granted. Had the District Court done as the Supreme Court of the United States says should always first be done—inspected the record to ascer-

tain whether or not it had jurisdiction, this cause would have ended there, unless proper amendments could have been, and had been, made. In writing the brief and arguing the case in this court, we unwittingly fell into the same error of taking the jurisdiction for granted.

It has always been held, ever since the case of **Capron v. Van Noorden, 2 Cranch 126, 2 L. Ed. 229,** that the Federal Court is a court of limited jurisdiction, and that where, by the record, jurisdiction does not appear as it ought to appear, then the case ought to be dismissed. And it was there held that **the plaintiff** could assign as error, lack of jurisdiction in that court, to which he had himself in the first place chosen to go.

There is in the case at bar, an allegation that the plaintiff was a corporation under the laws of the State of Michigan; there is no allegation, and no showing any where in this record, as to the citizenship of the defendants.

In the case of **Bors v. Preston, 111 U. S. 252, 28 L. Ed. 419,** in which the opinion was written by Justice Harlan, the Supreme Court said:

> "In cases of which the Circuit Court may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances,

declined to express any opinion upon the merits on appeal or writ of error where the record does not affirmatively show jurisdiction in the court below; this, because the courts of the Union, being courts of limited jurisdiction, the presumption in every stage of the cause is that it is without their jurisdiction unless the contrary appears from the record."

And in the case of **Mansfield C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. Ed. 462,** the Supreme Court said that it would, where no motion was made by either party, on its own motion, reverse a judgment for want of jurisdiction not only in cases where it is shown negatively that jurisdiction does not exist, but even when it does not appear affirmatively that it does exist. And the court said:

"It is true that the plaintiffs below, against whose objection the error was committed, does not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed, should be permitted to derive an advantage from it, but the rule springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requres the court, of its own motion, to deny its own jurisdiction, and in the exercise of it appellate power, that of all other courts of the United

> States, in all cases where such jurisdiction does not affirmatively appear in the record on which in the exercise of that power it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself even when not otherwise suggested and without respect to the relation of the parties to it."

The authorities bearing upon this question are collated in Taylor on "Jurisdiction and Procedure of the United States Supreme Court," pages 655, 656 and 657. Upon the authorities there cited, we respectfully suggest to this court that it is its duty to reverse the judgment of the District Court and remand the case for a dismissal. As the author of the textbook just referred to says:

> "Even when the parties fail to raise the question or consent that the case may be considered on its merits, the Supreme Court must examine and determine whether a Circuit Court of the United States has or has not jurisdiction of the case it is called upon to decide."

And again—

> "Where the case comes from a Federal Court on writ of error or appeal, the first and

fundamental question is that of jurisdiction—first of the Supreme Court, then of the court below."

And again—

"The Supreme Court, on its own motion, will, for a defective averment of citizenship, reverse a judgment of a Circuit Court and remand a case."

In Chapman v. Barney, 129 U. S. 677, 32 L. Ed. 800, the Supreme Court, after considering the errors assigned in the record, said:

"But aside from all this, we are confronted with the question of jurisdiction, which although not raised by either party in the court below, or in this court, is presented by the record, and under repeated decisions of this court must be considered."

We, therefore, submit that a re-examination of the pleadings in this case will show that the trial court was without jurisdiction to entertain the cause or enter any judgment therein, except one of dismissal, and that the only judgment that this court can enter, in the exercise of its appellate power, is to reverse and set aside the judgment and remand to the trial court, with directions to dismiss for lack of jurisdiction.

CONCLUSIONS.

As a final word on the merits of this case, we respectfully submit that the trial court and the jury were possibly influenced and misled in their consideration of the cause by what this court in its opinion has described as the great arrogance with which plaintiff's representatives treated the defendants and their counsel at their interview in the City of Eugene. We are ready to concede that that representative fell short of any standard of diplomacy, but yet we contend that the rights of the plaintiff should not be sacrificed by conduct or language of which it unquestionably would be the last to approve, but rather should be measured —(a) by the contract, which the trial court has said was the basis of the parties' rights, and which nevertheless we contend he misunderstood and misinterpreted, and—(b) by the evidence in the cause, and the pleadings, and the position taken by the defendants thereon.

We respectfully submit that this court in its opinion has overlooked the fact that the defendants at all times contended and insisted, even to the argument in this court, that the cars in question were their absolute property and that no demand or tender or any act on the part of the plaintiff could give the plaintiff any right to the possession thereof. With the defendants taking such a position, we sub-

mit that it is neither law nor common sense to require that proof of demand, which might be proper if the defendants had come in and said—"Yes, this is your property, but you haven't heretofore asked for its return."

We submit that the evidence, which we have heretofore in this petition for rehearing quoted, indicates that the defendants clearly understood that they were beng offered $16,077.50, and that that offer accompanied a request for the return of the cars. We further submit, that the court disregarded the contract between the parties in instructing the jury that they might award to the defendants profits on the sale of cars after the termination of the contract. We further submit that on the evidence in this case, even if the instruction just alluded to had not been erroneous, the defendants say all that could be said for their judgment, where on page 18 of their brief in this court they assert that appellant concedes (as it does not, and did not) "that the verdict for damages is fully sustained, except as to $3,507.75, and, therefore, we say the judgment should be affirmed, and the only question involved is whether we remit $3,507.75 or not." We do not find any offer on the part of the defendants beyond this, or any direction by the court that the judgment should require a remittitur in the amount named. There was some evidence offered, although we contend wrongfully, as to the items mentioned on the

page of respondents' brief referred to, but no evidence of any other or further damage.

We respectfully urge upon this court that the defendants on the trial of this case took a position and asserted claims in defiance of our rights under our contract with them—a contract which this court in the case of Ford Motor Company vs. Boone, et al., has held to be a valid and lawful contract. The record in this case discloses that on the trial, conflicting and contradictory positions were advanced with regard to this contract, and the plaintiff did not receive from the trial court a proper interpretation of said contract, and its rights have not been protected, and an erroneous judgment has been entered.

Respectfully submitted,

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